

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG SCOTT GLOVER,

Defendant-Appellant.

UNPUBLISHED

June 11, 2013

No. 308870

Wayne Circuit Court

LC No. 11-006368-FC

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of aggravated assault, MCL 750.81a, assault with intent to do great bodily harm, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to serve 93 days in jail for the aggravated assault conviction, and to three to 10 years' imprisonment for the assault with intent to commit great bodily harm conviction, one to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. BASIC FACTS

The instant case arises out of a shooting on June 1, 2011. Defendant shot the victim in the stomach following an argument in the street. The victim's liver and gallbladder were punctured, but he survived the shooting after surgery and hospitalization.

Defendant was charged with four counts: assault with intent to commit murder, assault with intent to do great bodily harm, felonious assault, and felony firearm. At the request of defense counsel, for each count except felony firearm the trial court also instructed the jury on the offense of aggravated assault as a "lesser included offense." Instead of the charged offense of assault with intent to murder, the jury convicted defendant of aggravated assault. On all other counts, the jury convicted defendant as charged.

II. INSTRUCTIONAL ERROR

On appeal, defendant first contends that he should be granted a new trial because the jury made contradictory findings on the elements of assault with intent to commit great bodily harm

and aggravated assault. We agree that the jury should not have been instructed on the offense of aggravated assault, but disagree that defendant should be granted a new trial.

MCL 750.81a(1), assault and infliction of serious injury, also known as aggravated assault, provides:

Except as otherwise provided in this section, a person who assaults an individual *without a weapon* and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both. [Emphasis added.]

Aggravated assault is a cognate, rather than necessarily included, lesser offense of assault with intent to commit murder, *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002), and assault with intent to commit great bodily harm, *People v Nyx*, 479 Mich 112, 118, n 14; 734 NW2d 548 (2007). A cognate lesser offense shares several elements, and is of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense. *People v Mendoza*, 468 Mich 527, 532 n 4; 664 NW2d 685 (2003). A defendant is not entitled to an instruction on cognate lesser offenses. MCL 768.32(1); *Cornell*, 466 Mich at 353-359; *Nyx*, 479 Mich at 121. Therefore, it was error for the court to give this jury instruction as a lesser included offense. Because defendant was convicted of aggravated assault, in lieu of the charged offense of assault with intent to commit murder, this error does appear to have resulted in defendant being convicted of assaulting the victim without a weapon, notwithstanding the clear evidence that defendant used a weapon.

However, the record shows that defense counsel specifically requested that the jury instruction for aggravated assault be given to the jury as a lesser offense for all counts except felony firearm. There was no objection, and the court indicated that it had expected defendant to request that instruction. Defense counsel further stated that she was satisfied with the instructions to the jury, and approved the form and content of the verdict form. In addition, defense counsel stated that she was satisfied with the court's instructions to the jury in answer to the questions submitted by the jury to the court during deliberations. Therefore, this issue is waived. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Because counsel's "affirmative statements were repeated, express, and unequivocal," the record clearly demonstrated "waiver — an intentional relinquishment of a known right." *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). "To hold otherwise would allow counsel to 'harbor error at trial and then use that error as an appellate parachute . . .'" *Id.* at 505 n 29, quoting *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010). We therefore only address defendant's claim of instructional error as it relates to his claim of ineffective assistance of counsel.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he was deprived of his right to the effective assistance of counsel. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App

656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Trial counsel's decision regarding which jury instructions to request is generally considered part of trial strategy, which this Court does not second-guess. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). Counsel is not ineffective merely because a trial strategy does not succeed. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Defendant contends that he was denied the effective assistance of counsel because (1) defense counsel failed to be certain that the jury's confusion about the verdict form was cleared up; (2) the jury was incorrectly instructed on the elements of aggravated assault because they were not told that one of the elements of aggravated assault was that a weapon was not used; and (3) the verdicts were inconsistent and defense counsel failed to raise that issue before the court.

A. JURY CONFUSION

Defendant argues that defense counsel was ineffective in failing to make certain that the jury's confusion about the verdict form was cleared up. We disagree.

The record shows that, during its deliberations, the jury sent several questions to the court. The jury was then called into the courtroom and the court addressed those questions. The court spent considerable time explaining its answers and, upon the court's inquiry, the jury indicated that it understood the explanations. Defense counsel was present to hear the court's explanations and to observe the jury's reactions and indications of understanding. Defense counsel stated that she was satisfied with the explanation and with the jury's understanding. There is no evidence on the record that the jury left the courtroom to continue its deliberations while in a state of confusion. The record thus contains no evidence that defense counsel's performance with regard to any jury confusion was objectively unreasonable. *Armstrong*, 490 Mich at 289-290. Further, the record does not show that following the court's instructions and the jury's indication to the court that it understood the instructions, the jury was in fact confused. *Cornell*, 466 Mich at 367.

B. ERRONEOUS JURY INSTRUCTION

MCL 750.81a(1), assault and infliction of serious injury, also known as aggravated assault, clearly provides, in pertinent part, that the element of assault must be without the use of a weapon. See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). However, CJI2d 17.6 does not contain the "without the use of a weapon" feature of the element within the instruction. Neither party, nor the court, noticed the discrepancy or raised the issue that aggravated assault is

a cognate lesser offense, which should not have been included in the jury instructions. As stated above, we conclude that this instruction was error.

However, defense counsel's request for aggravated assault was trial strategy. But for defense counsel's request to charge the jury on aggravated assault, as a lesser offense, the jury instructions would have included only the greater offenses. Counsel was successful in obtaining a verdict on Count I, which had charged defendant with assault with intent to commit murder, on the lesser offense of aggravated assault. Regardless of the fact that the court should not have given the instruction because aggravated assault is a cognate lesser offense, defendant arguably benefited by it, as discussed more fully below. Defendant has not demonstrated that a more beneficial outcome would have resulted had the instruction on aggravated assault not been given. *Cornell*, 466 Mich at 367. We find that defendant has not "overcome the strong presumption that defense counsel's action constituted sound trial strategy under the circumstances." *Strickland*, 466 Mich at 689; *Toma*, 462 Mich at 302.

C. INCONSISTENT VERDICTS

Finally, defendant argues that his trial counsel was ineffective in failing to raise the issue of inconsistent jury verdicts before the trial court. We disagree.

It has long been the law in this state that consistency in a jury verdict is not necessary. *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994); *People v Burgess*, 419 Mich 305, 308; 353 NW2d 444 (1984); *People v Lewis*, 415 Mich 443, 448-449, 453; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 465; 295 NW2d 354 (1980). "Each count in an indictment is regarded as if it was a separate indictment." *Id.*, quoting *Dunn v United States*, 284 US 390, 393; 52 S Ct 189; 76 L Ed 356 (1932) (citations omitted in original). However, defendant argues that the inconsistent verdict was based on jury confusion. See *Lewis*, 415 Mich at 450, n 9; *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). As noted above, the record does not establish that the jury verdict was the result of confusion.

Additionally, in *People v Lewis*, 415 Mich 443, 450, n 9; 330 NW2d 16 (1982), the Court stated:

Another view of the jury's verdict is that the jury was confused, did not understand the instructions, and did not know what it was doing. If that is what occurred, then the confusion taints the verdict finding the defendant not guilty of the underlying felony as well as the verdict finding him guilty of felony-firearm. *Jury confusion is not a reason to set aside the verdict of conviction and to uphold the verdict of acquittal, but rather would argue for setting aside both verdicts, with a new trial on both charges.* [Emphasis added.]

Defense counsel could have had a strategic reason for not pointing out any inconsistency of the verdicts. Because the instruction on the lesser offense was in error, pointing out the error may have resulted in a new trial on all charges (without the erroneous instruction on a lesser offense) and conviction on the greater charge of assault with intent to murder. Again, the erroneous instruction, which resulted in seemingly inconsistent verdicts, at least arguably benefited defendant; we conclude that defense counsel was not ineffective for failing to seek rectification

of this error. We decline to substitute this Court's judgment for that of counsel regarding matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

IV. CONCLUSION

Our Supreme Court has noted that “[i]nconsistent verdicts therefore present a situation where ‘error,’ in the sense that the jury had not followed the court’s instructions, most certainly has occurred, but it is unclear whose ox has been gored.” *United States v Powell*, 469 US 57, 65; 105 S Ct 471, 83 L Ed 2d 461 (1984). Here, it is plain that instructional error occurred; however it is not clear that the error prejudiced defendant. It appears at least as likely that defendant benefitted from the error. To determine whether defendant was actually prejudiced by this error would require “an individualized assessment of the reason for inconsistency . . . based either on pure speculation, or would require inquiries into the jury’s deliberations that courts generally will not undertake.” *Id.* at 66. We decline to undertake such an assessment. Thus we conclude that defendant cannot demonstrate that his trial counsel’s actions were not trial strategy, or that it is reasonably probable that his counsel’s failure to bring the error to the trial court’s attention was outcome determinative and prejudiced defendant. *Armstrong*, 490 Mich at 289-290.

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra